STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case originated as an appeal of a ruling of the Circuit Court of Autauga County, Alabama, granting summary judgment to two (2) insurance company defendants, namely: Capital Alliance Insurance Co., Inc., an Alabama corporation, (hereinafter referred to as Capital Alliance); and Capital Assurance Company, Inc. (hereinafter referred to as Capital Assurance). Capital Assurance is a foreign corporation. However, Capital Assurance is a surviving merger partner of Capital Alliance, an Alabama insurance corporation (C-119-23, Affidavit of Nancy P. Gordon). The Summary Judgment Order granted a Summary Judgment to Capital Alliance and Capital Assurance as to all allegations of a Complaint jointly filed by Petitioner Industrial Technologies, Inc., an Alabama corporation, and Richard O. Hill alleging that both of the insurance companies breached a contract of insurance with Industrial Technologies, and in the process, committed such wilful and intentional acts and omissions to constitute and satisfy the elements of the tort of bad faith denial of insurance coverage proceeds or benefits under Alabama law (C-82-92, Third Party Complaint). Industrial was an insured under the policy of insurance with Capital Alliance and made the bad faith claim. Capital Assurance is the surviving merger partner of Capital Alliance and executed a 1996-1997 extension policy with Industrial. (C-119-123, 347), which is the basis of all claims.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On July 2, 2002, Whitney National Bank filed an

action against Industrial Technologies, Inc. and Richard O. Hill, Sr., its sole stockholder making claims in two counts:

In Count I, Whitney alleged that Industrial (an Alabama corporation) executed a promissory note to Whitney on March 2, 2001, which note was guaranteed by Hill and now in default. Whitney requested judgment for $139,150.00 as principal due, $11,433.42 as interest due at 10.75% and a reasonable amount of attorney fees alleged to be $20,892.00, for a total damage demand under Count I of $171,455.42. In Count II, Whitney alleged that Industrial and Hill executed numerous promissory notes and collateral security agreements under a continuing business loan transaction series, which final note was past due and unpaid. Whitney demanded possession of the collateral shown in the collateral security agreements and UCC filings. The Complaints exhibits were a long series of notes, Bank of Prattville/Industrial Commercial Security Agreements beginning on July 5, 1996, a list and appraisal of property and equipment secured, and properly executed and filed financing statements covering the period from July 5, 1996 (C-12-42). Whitney amended the Bank of Prattville security filing on September 11, 2001 in order to re-establish security in all proceeds and instruments pertaining to the collateral described in the security instruments and listed/appraised equipment (C-37). Whitney as the surviving statutory merger partner of the Bank of Prattville, claimed successor legal right to all of the Bank of Prattville's secured instruments.

Industrial and Hill filed their responses and objected to the Whitney Complaint. Industrial and Hill filed an Answer and Counter Claim against Whitney primarily contending that Whitney was estopped and otherwise barred from bringing the collection action by virtue of its breach of a forbearance agreement by and between Industrial, Hill, the Bank of Prattville and

Whitney concerning a conversion action involving insured collateral (C-45-82). Moreover, on September 3, 2002, Industrial and Hill filed third-party claims against Capital Alliance and Capital Assurance (C-82-104). The Third Party Complaint alleged as follows: that Capital Alliance and Capital Assurance (by statutory merger) breached an insurance contract to pay Industrial and Whitney for insured collateral which had been wrongfully converted and destroyed by a third party (Jacobs Bank); for its unlawful and reprehensible failure to pay Whitney the contracted for insurance proceeds under a "loss payee" clause (insuring the collateral/proceeds to Whitney Bank) after lawful notice, demand and compliance with all conditions of the insurance agreement (C-45-81). Industrial alleged that the conduct of Third Party Defendants Capital Alliance and Capital Assurance, was unjustified, deliberate, intentional and reprehensible and breached its legal duties to Industrial and Hill, which breach also constitutes the tort of bad faith denial of Industrial's insurance claim. Thereafter, the insurers answered the claims and denied the allegations (C-105-114). The insurers Capital Alliance and Capital Assurance, however, admitted a continuous insurance contract between all parties covering a period from 1991 to January 27, 1997, but asserted several defenses.

Motions to dismiss the Complaint of Industrial and Hill were filed by Third Party Defendants Capital Alliance and Capital Assurance but denied by the Circuit Court of Autauga County, Alabama. (C-6, 115, 117). Thereafter, a Motion for Summary Judgment was jointly filed by Capital Alliance and Capital Assurance (C-382-454). After review of the material, the Circuit Court of Autauga County, Alabama, granted the Motions for Summary Judgment filed by Capital Alliance and Capital Assurance. The Order was filed on January 26, 2004. (C-832-834) and amended on February 12, 2004 (C-845).

The Circuit Court made no findings of fact nor drew legal conclusions. On February 25, 2004, Industrial and Richard Hill served their Motion to Alter, Vacate or Amend, pursuant to Rule 59, *Alabama Rules of Civil Procedure* (C-846-856), which was amended on February 26, 2004 (C-886). Capital Alliance and Capital Assurance each filed responses prior to April 15, 2004 (C-879-944). On May 3, 2004, the Circuit Court of Autauga County, Alabama, denied the Motion to Alter, Vacate, and/or Amend, again, without opinion. (C-6) The Appeal was filed on Monday, June 14, 2004, alleging that the Court improperly granted the Motions for Summary Judgment as filed by the insurance company defendants, and contending that material facts and law were in issue as to the tort claims but that Industrial would be entitled to a directed verdict as to its breach of contract claim in that it could not be refuted by credible admissible evidence. (C-895-898).

The Alabama Supreme Court affirmed without opinion on December 17, 2004. A rehearing was sought by Industrial alleging in relevant part that the no opinion orders violate Industrial's rights under the Fourteenth Amendment to the United States Constitution, as well as the contract clause of the United States Constitution. The Application for Rehearing was denied by the Supreme Court of Alabama, without opinion under Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, on February 11, 2005. Hence, this Petition for a Writ of Certiorari.

C. The Facts Presented to the Alabama Courts

Industrial Technologies, Inc. entered into a loan transaction with Whitney National Bank's predecessor in interest by merger, the Bank of Prattville in 1991. The loan was in the amount of $150,000.00. The loan was secured by equipment located on premises in Scottsboro,

Alabama, and secured through a Uniform Commercial Code (UCC) Financing Statement recorded with the Secretary of State of Alabama. (Affidavit of Albert C. Striplin, Bank of Prattville Officer Vol. 4-782). Mr. Striplin stated the loan required Industrial to: (a) Have Richard O. Hill, Sr., guarantee the loan; (b) that insurance be taken to insure collateral/equipment and that the Bank of Prattville be named loss payee and an additional name insured under the Capital Alliance policy in issue. Mr. Striplin stated all conditions of that loan were satisfied by Industrial (Vol. 4-782-783). It is undisputed that all such conditions were satisfied from the agreement date until January 27, 1997 when the Capitals withdrew from the State of Alabama,

The 1996 policy of insurance in effect at the time of the alleged loss appears at Vol. 4-646-660. The declaration page reflects the "Loss Payee" as the Bank of Prattville. Vol. 1-28-96, (also Vol-4-636). The policy was at replacement value under contract, without deduction for depreciation The policy provides under pertinent provision as follows (Vol. 4-655):

"C. Lenders loss payable.
1. The Loss Payee shown in the schedule or in the declaration as a creditor, including a mortgage holder or trustee, whose interest in covered property is established by such written instruments as: ...
c. Bills of Laden
d. Financing Statement; or
e. Mortgages, Deeds of Trust, or security Agreements.
2. For Covered Property in which both you and a Loss Payee have an insurable interest:
a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interest may appear...
C. If we deny you claim because of your acts or because you have failed to comply with the terms of the coverage

part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:
(1) pays any premium due under this coverage part at our request if you have failed to do so;
(2) submits a signed sworn proof of loss within sixty (60) days after receiving notice from us of your failure to do so;..."

The policy also provided for payment of the proceeds to the Bank of Prattville in the event of any alleged failure to satisfy any conditions of the policy by Industrial. Additionally, the loss payable conditions placed the burden on the insurer (Capital) to provide notice to the Bank of Prattville of any failure of Industrial to comply with conditions of the policy. Capital undisputably failed to satisfy this provision of the policy.

Additionally, the policy provided as follows with respect to the duties placed on the insured in the event of loss or damage:

"3. Duties in The Event Of Loss Or Damage
a. You must see that the following are done in the event of loss or damage to Covered Property:"

The duties under 3(a) included prompt notice and description of property; how loss occurred; protect the property; file inventories and values; permit investigation; sign sworn proof of loss on Capital form; and cooperate.

3(b) of the policy provided:

"b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed."

The policy provided for the taking of a deposition in 3(b)where all of the information requested in 3(a)(1-8) could be obtained. It is undisputed that Industrial fully cooperated with Capital and provided all documents requested, as well as submitted to a deposition and sworn proof of loss under 3(b) of the policy.

The policy provided a duty to pay and also undisputedly was modified to include a duty to pay or to defend. 4(e) provided:

"...e. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense." (Vol. 4-649)

After discussions concerning the Capitals failure to pay, Whitney as successor by merger in interest to the Bank of Prattville sued Richard O. Hill, Sr. and Industrial Technologies, Inc., demanding judgment in the amount of $171,455.42. Vol. 1-12. Count II of the Complaint demanded possession/recovery of the secured equipment and collateral under the Bank of Prattville and Whitney notes and security agreement (Vol. 1-13). The recorded UCC Financing Statement is attached to the Complaint. (Vol. 1-37,38). An appraisal was recorded with the UCC on March 1, 1996 Vol. 1-39-41. The total appraised value of the insured equipment was $497,874. The UCC was executed by Whitney as successor by merger to the Bank of Prattville. The various renewals and extensions of the promissory note (originally issued in 1991) begin with July 1996, (Vol. 1-14-36). The July 1996 Commercial Security Agreement (Vol. 1-32-36) dated on July 5, 1996 secured "equipment located at American Detention Products, Inc., Scottsboro, Alabama..." (Vol. 1-36). It is a stipulated fact of record that the policies were in force and effect at least through January 27, 1997.

D. THE EVENTS

Jacobs Bank at Scottsboro wrongfully converted the Industrial property. The facts underlying the Jacobs Bank (hereinafter referred to as Jacobs) litigation, the loan agreements and the insurance policy are set forth in Richard Hill's Affidavit which appears at Vol. 3-499-512. Mr. Hill stated (Vol. 3-503) that Jacobs obtained approval from the bankruptcy judge to move forward against a debtor known as ADPI in July 1992. The Bank wrongfully took possession of the Industrial equipment which was allegedly secured under a ADPI/Jacobs loan. The Bank took possession of all the equipment (including Industrial equipment located at the premises Vol. 3-504,505). Industrial's counsel provided Jacobs' attorney a letter including bills of sale and invoices of the equipment under which Industrial claimed ownership of the property taken. On or about April 1993, Hill went to the premises where the equipment was being stored but was unable to verify that a milling machine and a hardness testing machine were missing or present. As a result Hill (for Industrial) filed a claim with the insurance agent who had issued the then relevant policy with Capital on June 28, 1993, requesting that Capital investigate the claim. Industrial, followed up this claim with another letter dated January 20, 1994, wherein Hill stated that he had discussed the claim with an adjuster but had not heard further. According to Industrial statement given in July, 1993 (Vol. 4-664-675), an agent issued a report to Capital Alliance regarding the investigation of the claim with respect to the two pieces of equipment and acknowledged that Capital Alliance knew of the Jacobs litigation wherein Jacobs contested title to the equipment which was converted or contested by Jacobs. This was admitted in a memo on October 14, 1993. The second page of this report to Capital stated "You may wish to determine the outcome of the suit

whereby Jacobs is claiming ownership of the property. If the court awards ownership to the Bank, the insured might not have a insurable interest." (Vol. 4-677-678).

In October 1995, however, Hill discovered that someone had placed some of the contested equipment outside the premises at Goose Pond Industrial Park (some of the equipment was still inside the premises). He reported this to Richard Austin at Jinwright-Turner Insurance Agency and requested that Mr. Austin contact Capital. Mr. Hill further stated that in June 1996, he discovered that Jacobs had actually sold some of the equipment. Not long thereafter he determined that all the contested equipment (including the equipment which had been inside the premises) had been destroyed, sold or salvaged and not just a portion thereof. (Vol. 4-507). Hill stated that in July or August 1996 he became convinced that a wrongful conversion claim, based upon an insurable interest under the policy, now existed. A notice was given to Capital in 1996 and, again, in May 1997. (Vol. 5 p.830.)

At the request of Capital, Mr. Hill (for Industrial) on May 4, 1998, submitted to a sworn deposition providing his proof of loss (the examination was performed by Capital's attorney (Vol. 4-685-776). Industrial understood this sworn statement as being in full compliance with Section 3(a) and (b) of the policy as requested at the time by Capital's attorney. The exhibits to the deposition were taken from the boxes of materials provided to the attorney for Capital by Industrial's counsel. This information included Exhibit 1, Appraisal Data Sheet; Exhibit 2, the list of equipment; and Exhibit 3, stipulated and agreed equipment values. (Vol. 4-701). Counsel for Industrial noted that substantial materials had been previously provided to Capital's attorney; some of which were given on March 25, 1998.

Capital also had constructive (if not actual) notice of a mediation/arbitration process in which Hill had been

engaged in the Jacobs case by reason of its prior 1993-1994 notice and investigation.

It is undisputed that Industrial cooperated in all respects with every reasonable request made by Capital's Counsel. On or about March 17, 1998, Capital, through its attorney, acknowledged a March 12, 1998, meeting between counsel for Industrial and Capital. In correspondence, counsel stated: "If you know of any other documents or pleadings in your file which would be helpful in my inquiry as to whether or not coverage exists in this claim, I would appreciate it if you would send that along as well." (Vol. 1-147). Industrial's attorney complied with said request, as confirmed by the letter from Capital's attorney, dated March 26, 1998. "I am in receipt of your package of materials. I do appreciate your providing that information." (Vol. 1-148). Capital's counsel went on to state, "I had also requested a copy of the appraisal performed by Jacobs Bank on this equipment. Additionally, is Jacobs Bank contesting the ownership during the present litigation? I understand that for the purposes of mediation that they stipulated that the equipment was owned by Industrial. However, with the Supreme Court Opinion and the ruling of Randall Cole, I doubt that stipulation would be admissible .... Was there any judicial determination by any court of competent jurisdiction that the property was in fact owned by Richard Hill or Industrial Technologies?..." (Vol. 1-148). Capital was again providing evidence of its position (stated by Bobby Mizell in 1994) that they were awaiting judicial determination as to the issue of title to the equipment to establish whether coverage existed for the claim. (Vol. 1-148).

Capital Alliance never asked for additional information concerning the claim and never sent a reservation of rights letter to Industrial, nor was there any denial of any claim asserted by Capital under the policies or policy provisions. Clearly Industrial provided

a sworn proof of loss in May 1998, and asked for all benefits under the policy. This included the benefit of payment or any duty to defend.

Notices of the claim were, however, made by Industrial prior to the January and May 1998 notice. Hill testified that he noticed Richard Austin in 1996 as well as notified Jinwright-Turner in 1997. In fact, the unrefuted evidence is that Ms. Wingard confirmed that she worked for Jinwright-Turner Insurance and Bonds in Montgomery, Alabama, in the early spring of 1997 (Vol. 5-830); that she was manager of all claims filed for the policies of insurance issued through Jinwright-Turner which included the Capital policy. She stated that Mr. Hill reported a claim concerning equipment which Industrial had insured through her company and agents. She stated that in 1997 Mr. Hill was making a claim because the equipment had been destroyed. She further stated that she faxed the information concerning that claim to Capital Alliance immediately after she met with Mr. Hill. Ms. Wingard stated that Mr. Hill (for Industrial) provided documentation which she had requested as part of the claims process. She stated that would have been on or about May 12, 1997, and that she, as claims manager for Jinwright-Turner, forwarded the claim on to Capital. She further stated that a claims file was set up on that claim. (Vol. 5-830).

E. THE CONVERSION CLAIM DECISION AGAINST JACOBS

In the Jacobs litigation, after a Mandamus was denied, the jury returned a verdict on December 7, 2001, declaring that Industrial was the owner of the equipment and awarding Industrial compensatory damages of $148,000.00 and punitive damages of $250,000.00 (Vol. 4-786-787). Interest in the amount of $82,000.00 was later calculated and added to the award. Punitive

damages were set aside but re-instated by the Alabama Supreme Court on appeal. See Vol. 3-424, 427-442. The conversion issue was not appealed by Jacobs.

After the jury verdict, which confirmed title to the equipment in Industrial and before any payment was made by Jacobs to Industrial, (and as a result of a Whitney threat to call the renewal loan), Industrial demanded payment to Whitney under the Capital policy of insurance insuring both Industrial and Whitney (as loss payee). Industrial further advised The Capitals of possible additional damages, interest and attorney fees if the claim was not paid. Those notices were confirmed by counsel for Capital dated August 14, 2002, in the letter appearing at Vol. 2-417 where Capital denied the claim. This letter also represented the first notice of denial of Industrial's claim under the policy. This is conclusively shown to be the legal date Capital breached the insurance contract with Industrial and Whitney. Prior to date the Capitals had taken a wait and see approach based on the question of title.

Mr. Hill contented that Industrial's property was insured by Capital Alliance and Capital Assurance at it replacement value without deduction for depreciation and showed the policy provisions. He stated that without legal fees and litigation expenses his losses still exceeded the $148,000.00 jury award by $527,000.00 (Vol. 2-250). The conversion claim, under Alabama law, was based on a different asset value standard. Clearly, Industrial was never made whole nor compensated for its total replacement value damages without deduction for depreciation. In spite of the factual contentions, the Trial Court granted Summary Judgment Without Opinion even though the breach of contract was clearly and conclusively shown. Thereafter, the Alabama Supreme Court Affirmed Without Opinion. Industrial requested a rehearing alleging in pertinent part:

Based upon the above and foregoing, Industrial

Technologies, Inc. and Richard O. Hill, Sr., respectfully request a rehearing pursuant to Rule 40, *ARAP*.

F. THE MATERIAL ARGUMENTS BELOW FOR REHEARING

1. A valid contract was entered into between Industrial and Capital on or about January 27, 1996, annual premiums were paid by Industrial and a covered event arose on or about June 26, 1996. Industrial paid the insurance premiums through the date of loss. The last premium paid was for the entire 1996 year during which time the loss occurred. Industrial fully complied with the contract terms and notice provisions of the annual insurance policy issued by Capital on January 27, 1996. An event occurred on or about June 26, 1996, notice was given without objection and a complete statement of claim occurred on May 4, 1998. This was within the legal statute of limitations period.

2. Any alleged failure of notice, failure of a condition precedent as to contract conditions, including failure to execute any sworn proof of loss on Capital Alliance's forms were waived where said defenses were not affirmatively pled by Capital Alliance. Moreover, the Capitals failed to allege various affirmative defenses in its denial of the claim and failed to assert them in its Answer. The original Third Party Complaint in this action was filed on August 30, 2002 (Vol. 1-99) after the claims were denied on August 14, 2002. The original Answer of Capital Alliance Insurance Company was filed on October 3, 2002 (Vol. 1-115-116). No where in the Answer did Capital state the affirmative defenses of (a) failure of conditions precedent;(b) failure of notice and/or a delay in notice in failing to comply with the contracts terms; (c.) nor failure of any condition precedent including executing a sworn proof of loss. Moreover, they had never mentioned these issues in the

discussions.

The Capital Assurance Response was filed on October 3, 2002 (Vol. 1-117-118). It sets forth no properly averred affirmative defenses to the contract claims on behalf of the Capitals. Moreover, since no denial of the claim was made by Capital within sixty (60) days from May 4, 1998, (the completed claim date) or at the time of the claim denial (on August 14, 2002), the statutes of limitations had not expired. The Alabama Supreme Court has so held. See *Robinson v. Morris*, 352 So.2d 1355, 1357 (Ala. 1977)... *Wallace v. Alabama Ass'n of Class. School Emp.*, 463 So.2d 135, 136, 137 (Ala. 1984). See also *Patterson v Liberty National Life Ins. Co.*, 2004 WL 2418070 (Ala. Oct. 29, 2004).

Additionally, Rule 9(c), *ARCP*, requires matters pertaining to conditions precedent to be pled specially which Capital failed to do in its Answer. Moreover, Industrial filed a Motion in Limine requesting that any such affirmative defenses be stricken or prohibited from use (Vol. 2-263). Industrial did all it was supposed to do in order to bar and prohibit any such defenses.

3. The Capitals are estopped from arguing laches, statute of limitations, unclean hands and judicial estoppel.

It is also clear that Capital through its counsel represented to Industrial that any decision on coverage after the notice was provided would be reserved until there was a judgment rendered on the declaratory judgment action filed by Jacobs against Industrial concerning the title to the equipment insured under the policy. Industrial in good faith relied upon these representations. The Alabama Supreme Court has held: "One who seeks equity must do equity, and one that comes into equity must come with clean hands. --*J & M Bail Bonding Co. V. Hayes*, 748 So. 2d 198 (Ala 1999)...--*Jamison, Money, Farmer & Co., P.C. v. Standeffer*, 678 So. 2d 1061." Industrial, just as Capital wished, waited for

the jury verdict and then noticed Capital that the declaratory judgment (title) issue was resolved in Industrial's favor in accordance with its reliance on Capital's consistent wishes. An estoppel must be found.
4. Judicial estoppel does not exist here. Industrial has not taken any inconsistent position and has not deliberately manipulated the courts. There were no substantially similar parties, issues or facts before the court in the Jacobs case and this case. The contract of insurance covered the equipment property for its replacement value without deduction for depreciation, rather than market value as in conversion law issues being decided in the Jacobs case. Moreover, not only were the claims in the Jacobs' action and this action different, there was no substantial identity between the parties. The issues and facts in controversy in the Jacobs action and this action were vastly different. Therefore, Capital cannot meet the elements of *res* judicata, nor judicial estoppel.

In the case at trail level Industrial clearly demanded a contract benefit in either paying or defending the Whitney claims, which benefit was denied on August 14, 2002, by a breach clearly within the statute of limitations of six (6) years. Capital paid no claim nor offered to reimburse Industrial for litigation expense and attorney fees. Capital failed to offer any replacement value coverage without deduction for depreciation over the conversion damage assessment of the Jacobs jury. There is no double recovery in this case and the Capital's have waived all defenses in this case.

The Affidavit of Richard Hill sets forth his replacement value damages, together with appraisals. (Vol. 2-249, 250). The evidence before the Court at the time of the Summary Judgment clearly stated that Hill's replacement value damages exceeded the compensatory damage award by approximately $500,000.00. Although it may be contested by Capital, a jury must make this

determination under appropriate instruction from the trial court. Moreover, the punitive damage assessment in *Jacobs* could not be utilized under any subrogation or double recovery concept under Alabama law. *Powell v. Blue Cross and Blue Shield of Alabama*, 581 So.2d 772 (Ala. 1990) at page 778 thereof, states as follows:

"[6] This holding requires calculation and comparison of two amounts (1) the amount of the plaintiff's total loss and (2) the total amount that the plaintiff receives in compensation for that loss. The determination of what the plaintiff's loss is and whether he has been made whole for that loss, is a question of fact. Calculation of the plaintiff's loss requires the finder of fact to consider all elements of that loss, including, but not limited, damage to property, medical expenses, pain an suffering, loss of wages, and disability. Because punitive damages are not an element of compensation, they cannot be included in the calculation of the plaintiff's loss..."

6. Based upon the above and foregoing the bad faith claim was clearly appropriate as any alleged defenses which could have supported a denial of the contract claim were waived; and the statute of limitations does not apply, therefore, Capital's breach was without legal justification and the bad faith claim of Industrial was meritorious.

Moreover, breach of the insurance contract, whether as to the 1993 claim or the 1996 claim, could not have occurred sooner than July, 1998 (60 days following the sworn statement requested by the Capitals) and did not occur until the denial of coverage on August 14, 2002. Since the 1993 alleged claim was never denied and the 1996 claim was based on the May 4, 1998, statement, each alleged claim was filed within the statutory period. The limitations period was six years. Therefore, there was no statute of limitations bar to any Industrial claim.

Since the statute of limitations did not apply there was no defense to the breach of contract that can be asserted by the Capitals.

7. Alternatively, and without waiving any arguments, Industrial respectfully submits that the notice was timely in light of any delays caused by the Jacobs litigation, its mediation process and a Petition for Writ of Mandamus filed in the Circuit Court of Jackson County, Case CV-02-203.

8. Capital breached its duty to pay or defend. The Alabama Supreme Court has held:

"[6] Under the present Alabama rules of procedure, it is quite possible that the character of the plaintiffs' claim against Ladner may change, as Judge Hand noted, even during the course of the trial; and, of course, the plaintiffs' complaint may be amended even after the evidence is in to conform to that evidence because that is so, the insurers should be mindful that:

"It is clear that where a claim potentially may become one which is within the scope of the policy, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril ..." *Cadwallader v. New Amsterdam Casualty Co.*, 396 Pa. 582, 152 A.2d 484, 488 (1959) *Bandy v. Avondale Shipyards, Inc.*, 458 F.2d 900 (5th Cir. 1972)." Ladner & Co., Inc. V. Southern Guaranty Ins., Ala., 347 So.2d 100, 104 (Ala. 1977).

The duty to pay or defend was clearly inserted in the policy undisputedly by the 1996 policy issue (at the time of loss). Industrial in the sworn proof of loss requested all benefits available under the policy (which included the duty to pay or to defend). Therefore, Capital's wait and see approach was at its own peril and should be at its expense. Since a clear right to relief is shown, the

denials without opinion violated United States Constitutional principles.

9. The constitutional rights of Industrial were deprived under the Fourteenth Amendment to the United States Constitution where the Trial Court and the Supreme Court each issued no opinion Orders denying relief and without setting forth a factual basis for denial of Industrial's claim for damages that proximately caused a loss of its property interest.

A. The no opinion summary judgment decision of the trial court and the no opinion affirmance on appeal violates Industrial's rights under the due process clause of the Fourteenth Amendment to the United States Constitution, because it renders the appeal ineffective for due process purposes and the decision is not supported by the record.

"Where the record does not support the judgment - due process is implicated and the judgment is void." *Vachon v New Hampshire., 414 U.S. 478, 94 S.Ct 664, 38 L.Ed 2d 666 (1974). See also application in a civil proceeding* Zenith Radio Corp. V. Matsushita Electric Industrial Co., LTD, et. al., 723 F.2d, 238, 304.

In the present case an insurance contract is clearly shown between the parties; the January 27, 1996 to January 27, 1997 contract insured Industrial property; a claim was filed and denied. Based upon facts previously stated, the loss occurred in June 1996, notices were given in 1996, 1997, and 1998, a sworn proof of loss occurred in May 1998, no denial of the claim occurred until August 14, 2002 after all appropriate notices were made and Industrial complied with policy requirements, all of which clearly fell within the six (6) year limitations period. The record does not support the no opinion judgment.

B. The no opinion denials of Industrial's property

interest claim was tantamount to the denial of a remedy to Industrial and/or access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution. See Boddie v. Connecticut 401 U.S. 371, 91 Sup.Ct. 780, 28 L Ed 2d 113 (1971); United States v. Kras 409 U.S. 434, 93 S. Ct. 631, 34 L Ed 2d 626, (1973); Although Court access generally follows the fair trial decisions *Marshall v. Jerrico Inc.*, 446 U.S. 238, 100 Sup.Ct 1610, 64 L ed 2d 182 (1980) and In Re Murchison 349 U.S. 133 75 Ct. 623, there need not be proof of intentional conduct. See *McCray v. Maryland* 456 F.2d 1, (4th Cir 1972). In the present case, the combination of a factually unsupported summary judgment order and the lack of a stated factual evaluation as to the evidence at trial and on appeal is alleged by Industrial to be tantamount to a denial of constitutional fair trial requirements, reasonable access to the courts and/or the denial of a remedy, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

C. The no opinion denials of Industrial's property interest claim is tantamount to the denial of Industrial's right to a jury trial as a remedy and the right of appeal as a remedy enjoyed by all other "persons" in the State of Alabama alleging similar property interest claims and similarly situated as to the facts of this case, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Plyer v. Doc 457 US. 202, 102 S Ct. 2382, 72 L Ed 2d 786 (1982) : F.S. Royster Gu Co v. Virginia 253 U.S. 412, 40 S Ct. 560, 64 L Ed 898 (1920) Hayes v. Missouri 120 U.S. 68, 7 S Ct. 350, 30 L Ed 578 (1987). In the present case, Industrial is aware that the Supreme Court remains ultimately responsible for upholding the law and providing appropriate judicial procedures for access to the Courts under the law of Alabama. However, the Court's alleged upholding of the law applicable to a set

of facts shown or found must not amount to a substitution of its views for that of a jury when to do so would be the effective denial of a right to a trial by jury or some other entitlement under the law. Connell v. Sears Roebuck & Co. 722 F.2d 1542 (5th 1983). In this case, the constitution and laws of the State of Alabama clearly grant the right to trial by jury to those similarly situated. See Article 1 § 11 Constitution of Alabama 1901; Article 1 § 13 Constitution of Alabama 1901; and 12-22-40 and 41 Code of Alabama 1975. Since Alabama grants such rights to all persons, such as Industrial, as are similarly situated, the no factual based order granting the Motion for Summary Judgment to Capital, and the no-opinion order of the Supreme Court, under the facts of this case, has denied Industrial equal protection of the laws enacted by the State of Alabama, contrary to the Fourteenth Amendment to the United States Constitution.

D. The trial court's granting of a summary judgment to third party defendant Capital without opinion, coupled with the Supreme Court's application of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure,* and its affirmance without opinion constitutes the denial of a remedy for the enforcement of the obligations of contract owed by Capital to Industrial under the 1992-1993 policy, in violation of the "contract clause" of the United States Constitution, Article I, Section 10, Clause 1.

The Application for Rehearing was denied by the Alabama Supreme Court, again, without opinion on February 11, 2005. Hence the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

An insurance contract and breach by the insurance companies Respondent has clearly been established under Alabama law, but no opinion orders have

unconstitutionally denied relief. The undisputed evidence shows that a valid contract of insurance existed between Industrial (Petitioner herein), the Bank of Prattville and Capital Alliance (Respondent herein) during 1992, and on June 26, 1996. Furthermore, an insurance contract was issued, executed and a coverage premium was paid by Industrial for the property insured at all times during the period from 1992, to January 27, 1997. Moreover, an insured event occurred on or about June 26, 1996. The foregoing facts were established as a matter of certainty. Petitioner contends that any alleged failure of notice, or failure of any other alleged condition precedent, is without legal justification and, in any event, were waived where notice of the reasons for a claim denial were not given within a reasonable time following a May 4, 1998, complete and thorough sworn statement of claim. The Capitals asserted issue of delayed notice does not help them. Any alleged delayed notice was reasonable under the circumstances in that such alleged delays were only based on the conduct of the Capitals. Since these contentions are either uncontradicted or supported by substantial evidence, they are subject to jury decision under Alabama law, and a summary judgment was, therefore, improperly entered in favor of the Capitals.

THE UNITED STATES CONSTITUTION CLAIMS

The constitutional rights of Industrial were deprived under the Fourteenth Amendment to the United States Constitution when the trial court and the Supreme Court of Alabama issued orders failing to set out a factual basis for the court's denial of Industrial's claims for damages that proximately caused a loss of its property interest. The no opinion summary judgment decision of the Trial Court and the no opinion affirmance on appeal violates Industrial's rights under the due process and equal

protection clauses of the Fourteenth Amendment to the United States Constitution, and render the appeal ineffective for due process purposes, because:

First, the no opinion denials of Industrial's property interest claim were not supported by the record and constitutes a denial of Industrial's right to due process of law contrary to the Fourteenth Amendment to the Untied States Constitution. *Vachon v. New Hampshire*, 414 U.S. 478, 94 S. Ct. 664, 38 L.Ed 2d 666, (1974) and *Zenith Radio Corp v. Matsushita Electric Industrial Co. LTD, et al*, 723 F2d 238, 304.

In the present case, an insurance contract is clearly shown obligating the parties. The January 27, 1996 to January 27, 1997 contract insured Industrial property that was then subjected to litigation claims of Jacobs Bank; which claims were known to the Capitals in 1993 (1992-1993 policy renewal) and at the time the 1996 policy was issued; the 1996-1997 policy insured the Jacobs litigation property for its replacement value without deduction for depreciation; a premium was paid for all coverage terms and for benefits insured from January 27, 1996 to January 27, 1997; the Court Order of the Jackson County Circuit Court during June 1996 and/or the Jacobs Order in 2001 terminated any legal justification for the Jacobs Bank possession of insured property and set the date for a claim of wrongful conversion. Moreover, wrongful conversion admittedly was a covered claim under each policy between Industrial and Capital from 1992-1997; notice of the Jacobs contract issues and contentions were given to Capital on July 1, 1993, May 1997, January 28, 1998, May 4, 1998 and April 15, 2002. Since the destruction and conversion event occurred in June 1996, and was followed by notices to Capital, without objection, and a sworn proof of claim filed on May 4, 1998, the final denial of the claim without reciting a contract basis or a contract defense by Capital on August 14, 2002, (well

within the six (6) year statute of limitations term beginning not earlier than May 4, 1998) is not only a breach of contract but, if considered as a separate matter, constitutes a waiver of all notice and condition precedent defenses. Therefore, the Trial Court's Form Order granting Capital's Motion for Summary Judgment on January 26, 2004, and February 12, 2004, combined with the Supreme Court's No Opinion Affirmances of said order constitutes a judgment of judgments entered that is not supported by the record of trial proceedings, in violation of Industrial's right to due process of law under the Fourteenth Amendment to the United States Constitution. See *Vachon v. New Hampshire*, and *Zenith Radio Corp. V. Matshrahita Electric Industrial Co. LTD, supra.*

Secondly, the no opinion denials of Industrial's property interest claim was tantamount to the denial of a remedy to Industrial and/or access to the courts contrary to the due process clause of the United States Constitution. See Boddie v. Connecticut 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed 2d 113 (1971); United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed 2d 626 (1973). Although court access issues generally follows fair trial decisions such as Marshall v. Jerrico Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 Led 2d 182 (1980) and In Re Murchison 349 U.S. 133, 75 S.Ct. 623, there need be no proof of intentional conduct. See McCray v. Maryland, 456 F.2d 1, (4th Cir. 1972). In the present case, the combination of a no opinion affirmance of a factually unsupported summary judgment order and the lack of a stated factual basis as to the weight of the evidence at trial and on appeal is alleged by Industrial to be tantamount to a denial of constitutional fair trial requirements, its reasonable access to the courts and/or the denial of a remedy, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. Moreover, as to an officials

contention that one complies only with otherwise reasonable policies, commands or rules, Industrial submits that such contentions are not effective to avoid a violation, where the act has a coercive effect as to due process rights. Lombard v. Louisiana, 373 U.S. 267, 83 Sup.Ct. 1122, 20 L.Ed 2d 338 (1963).

Third, Industrial also contends that the no opinion denials of Industrial's property interest claim is tantamount to the denial of Industrial's right to a jury trial, a remedy, and the right of appeal, also a remedy, enjoyed by all other "persons" in the State of Alabama alleging similar property interest claims and similarly situated as to the facts of this case, all contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Plyer v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 Led 2d 786 (1982); F.S. Royster Guao Co. V. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed 98 (1920); Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed 578 (1887).
See also Connell v. Sears Roebuck & Co. 722 F.2d 1542 (5th 1983).

In this case, the Constitution and law of the State of Alabama clearly grants the right to trial by jury, the right to a just remedy and right to appeal to all persons similarly situated. See Article 1 § 11, Constitution of Alabama 1901; Article 1 § 13, Constitution of Alabama 1901; and 12-22-40 and 41 Code of Alabama, 1975. Since Alabama grants such rights to all persons, such as Industrial, that are similarly situated and no factual basis for the orders granting the Motion for Summary Judgment to Capital is given, which can distinguish Industrial's prima facie claim, the No Opinion Order of the Supreme Court has denied Industrial equal protection of the laws enacted by the State of Alabama, contrary to the Fourteenth Amendment to the United States Constitution. This is so because, as stated in all preceding arguments, there (at the least) was such

substantial claims and evidence presented to the Trial Court below that reasonable people (the contract jurors), in the exercise of impartial judgment, might reach different conclusions on such issues as claims of reasonable delays in notice, waiver of contract conditions and/or contract damage amounts, where, as here, Industrial made a jury trial demand (C. 100). A jury trial of right existed and right of appeal existed here, which is granted to all persons raising such issues and similarly situated to Industrial in proceedings granted as of right by the State of Alabama.

Fourth, the Trial Court's granting of a summary judgment to Third-Party Defendants, the Capitals, without opinion, coupled with the Supreme Court's application of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, (a qualified legislative act) and its affirmance without opinion (if it is found that the 1992-1993 contract is at issue) constitutes the denial of a remedy for the enforcement of the obligations of contract owed by Capital to Industrial under the 1992-1993 policy in violation of the "contract clause" of the United States Constitution, Article 1 § 10, Clause 1.

In the present case, Industrial first gave notice of an alleged act or action taken by Jacobs Bank in April 1993 to legally assert control over property insured by Capital to Industrial and the Bank of Prattville. This notice was given on June 28, 1993. In so far as Capital contends that the Jacobs acts constituted a wrongful conversion upon which the six (6) years statute of limitations can be asserted as a defense to a breach of contract claim brought under the 1992-1993 policy, Industrial submits that; (1) the actions of Jacobs affected insured property under a contract policy covering a period beginning in the year 1992; (2) that such contract coverage and coverage period was prior to the adoption of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure* (1993), (3) that Rule 53(a)(1) and 53(a)(2)(f) constitutes a

qualified legislative act under the contract clause of the United States Constitution; (4) that a jury question of waiver, or concerning obligations upon which the contract was breached existed (i.e., 1992 to 1993), (5) that a jury question existed as to whether Capital, by continuing the claim investigation for a title decision, breached the 1992-1993 insurance contract on January 28, 1998, or on August 14, 2002. (Both within six (6) years of April 1993); (6) that the May 4, 1998, Proof of Claim after request could be a completed and valid proof of a timely claim under the 1992-1993 policy provisions (7) that the May 4, 1998, proof of a timely claim was not affirmatively denied until August 14, 2002, and in no event, could be construed as denied prior to the May 4, 1998, (the requested Proof of Claim date). Thereafter, a breach issue and jury question existed as to such denial and breach of the 1992-1993 policy). The lack of findings shown by the Summary Judgment Order and the Affirmance of Appeal Order (Without Opinion) in the Supreme Court, through the application of Rules 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, constitutes a denial of a remedy to Industrial for the enforcement of valid obligations of contract owed from Capital to Industrial, under the 1992 policy, and thereby impaired the obligations of contract contrary to the contract clause of the United States Constitution, Article 1, Section 10, Cl.1. See E & E Hauling, Inc. vs. Forest Preserve District, 613 F.2d 675 (7th Cir. 1980); New Orleans Waterworks Co v. Louisiana Sugar Refining Co. 125 U.S. 18 S.Ct. 741 31 L.Ed 607 (1888).

Therefore, even if the Alabama Courts considered the 1992-1993 contract as being the only contract at issue, a constitutional violation has still occurred.

CONCLUSION

In conclusion, Petitioner requests the Court to

accept the Petition for Certiorari, reverse the decision of the Supreme Court of Alabama and remand the case for trial on the merits.

Respectfully submitted,

Donald G. Madison

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JULY 14, 2005

IN THE CIRCUIT COURT OF
AUTAUGA COUNTY, ALABAMA

WHITNEY NATIONAL BANK,	*	
	*	
PLAINTIFF,	*	
	*	
V.	*	CASE NO. CV-02-194
	*	
RICHARD O. HILL, et. al.,	*	
	*	
DEFENDANTS.	*	

ORDER

This matter was called for pretrial hearing and hearing on pending motions for summary judgment. All parties were represented by their respective counsel of record and the Court heard the arguments of counsel both in support of and in opposition to the subject motions. After careful consideration of the motions for summary judgment and the responses thereto, together with the arguments of counsel, the Court hereby ORDERS as follows:

1. That Plaintiff, Whitney National Bank's motion for summary judgment is well taken and is hereby granted and judgment is entered in favor of the Plaintiff and against the Defendants, Richard O. Hill and Industrial Technologies, in the amount of $203,836.20 plus costs for which execution may issue.

2. That Defendant Capital Assurance Company and Defendant Skandia Reinsurance Corp. Are hereby dismissed as party Defendants.

3. That Counter-Defendant, Whitney National

Bank and Defendant, Capital Assurance Insurance Company's motions for summary judgment are due to be and are hereby granted.

4. That the entry of this Order is intended to dispose of all claims, issues and parties and is a final Order in this case.

ORDERED this, the 26th day of January, 2004.

BEN A. FULLER,
Circuit Judge

IN THE CIRCUIT COURT OF
AUTAUGA COUNTY, ALABAMA

WHITNEY NATIONAL BANK,	*	
	*	
PLAINTIFF,	*	
	*	
V.	*	CASE NO. CV-02-194
	*	
RICHARD O. HILL, et. al.,	*	
	*	
DEFENDANTS.	*	

AMENDED ORDER

It is hereby ORDERED that paragraph 3 of this Court's Order entered in the above-styled case on January 26, 2004, is hereby amended as follows:

1. That Counter-Defendant, Whitney National Bank and Defendant, Capital Alliance Insurance Company's motions for summary judgment are due to be and are hereby granted.

The Clerk shall notify all counsel of record.

ORDERED this 12th day of February, 2004.

BEN A. FULLER
CIRCUIT JUDGE

A-4

RELEASED

DEC 17 2004

CLERK
SUPREME COURT OF ALABAMA

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2004-2005

1031438

Industrial Technologies, Inc. v. Capital Alliance Insurance Company, Inc., and Capital Assurance Company, Inc.
Appeal from Autauga Circuit Court, CV-02-194

LYONS, Justice

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Nabers, C.J., and Houston, Johnstone, and Woodall, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

February 11, 2005

1031438
Industrial Technologies, Inc. v. Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc. (Appeal from Autauga Circuit Court: CV-02-194).

ORDER

The application for rehearing filed in this cause is overruled.

LYONS, J. - Nabers, C.J., and Woodall, Smith, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court Of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 11th day of February, 2005.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

Code of Alabama, 1975, as Amended

§ 6-2-34. Commencement of actions -- Six years.

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion of personal property;

(4) Actions founded on promises in writing not under seal;

Code of Alabama, 1975, as Amended

§ 10-2B-11.06. Effect of merger or share exchange.

(a) When a merger takes effect:

(1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) The surviving corporation thereupon and thereafter possesses all the rights, immunities, and franchises, of a public as well as of a private nature, of every corporation party to the merger; and all property, real, personal and mixed, and all debts due each of the corporations so merged, are taken and deemed to be transferred and vested in the surviving corporation without further act or deed; and title to any real estate, or an interest therein, vested in any of such corporations shall not revert nor in any way be impaired by reason for such merger;

(3) The surviving corporation shall be responsible and liable for all the liabilities and obligations of each corporation party to the merger; and neither the rights of creditors nor any liens upon the property of any corporation party to the merger shall be impaired by the merger;

(4) An claim existing or action or proceeding pending by or against any corporation party to the merger may be prosecuted, or continued, as if the merger had not taken place, or the surviving corporation may be substituted in the action or proceeding for the corporation whose existence ceased;

Alabama Rules of Civil Procedure

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof;

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(3) *Judgment.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Alabama Rules of Civil Procedures

RULE 9. PLEADING SPECIAL MATTERS

(c.) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Alabama Rules of Appellate Procedure

RULE 53. OPINIONS AND "NO OPINION" CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C.) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

Supreme Court, U.S.
FILED
AUG 19 2005
OFFICE OF THE CLERK

No. 05-108

IN THE

Supreme Court of the United States

INDUSTRIAL TECHNOLOGIES, INC.,

Petitioner,

v.

CAPITAL ALLIANCE INSURANCE COMPANY and CAPITAL ASSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondents, Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc. are wholly owned by Skandia America Corporation.

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INTRODUCTION

Respondents, Capital Alliance Insurance Company and Capital Assurance Company, hereinafter "Respondents" or "Capital Alliance," file this response to the petition for writ of certiorari filed by Industrial Technologies, Inc., hereinafter "Industrial." For reasons outlined herein, Respondents assert that this Court does not have jurisdiction to review the Alabama Supreme Court's order affirming summary judgment in favor of Respondents. Additionally, Respondents submit that the proceedings in the state court were not in violation of Industrial's constitutional rights.

STATEMENT OF JURISDICTION

Respondents respectfully assert that Industrial does not present any issue invoking this Court's jurisdiction. This Court's Rules 10(b) and 10(c) both identify circumstances under which this Court may opt to issue a writ of certiorari. Both rules refer to instances where a state court of last resort has "decided an important federal question." Additionally, under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

A prerequisite under all of these cited authorities is a decision from the highest state court deciding a question of federal or Constitutional law. The Supreme Court of Alabama did not decide a question of Constitutional law and did not rule on

any federal questions. Industrial did not assert any Constitutional claim or issue in the trial court or in its appeal to the Alabama Supreme Court. Industrial raised the issue of the Constitutionality of the "no opinion" orders of the trial court and the Alabama Supreme Court for the first time in an Application for Rehearing before the Alabama Supreme Court. As discussed in the Argument below, this was insufficient to preserve any Constitutional issue and, in any event, the Alabama Supreme Court's decision to uphold summary judgment and deny the application for rehearing is based on adequate independent state law grounds. This Court thus has no statutory basis for exercising jurisdiction to review that court's decision.

STATEMENT OF THE CASE

A. Statement of the Facts

This action was initiated by Whitney National Bank in the Circuit Court of Autauga County, Alabama, on July 2, 2002. (C. 12 and 13). This action was based on a note between Whitney National Bank's predecessor in interest, the Bank of Prattville, Richard O. Hill and Industrial Technologies, Inc., which was executed on March 20, 2001. (C. 12-14). The appeal against Whitney National Bank has been dismissed. For the sake of brevity, all further references to "plaintiffs" or petitioner are to third party plaintiffs Industrial Technologies and Hill. All further references to "defendants" are to third party defendants Capital Alliance Insurance Company, Inc., Capital Assurance Company. (No appeal was filed as to third party defendant Skandia America Reinsurance Company).

Defense counsel responded to plaintiff's attorney's telefacsimile letters [which are not part of the record on appeal] by letter dated August 14, 2003. In said letter, plaintiff

was advised that the Whitney Bank litigation would not be defended by Capital Alliance. (C. 814). One reason for the denial, inter alia, was that the insurance contract expired by its own terms at 12:01 a.m., January 28, 1997, and the Whitney contract was not executed until March 20, 2001. (C. 207, 393-395).

Mr. Hill and Industrial Technologies, Inc. filed a third party complaint against Capital Alliance Insurance Company, Inc., Capital Assurance Company, Inc. and Skandia America Reinsurance Corporation on or about August 30, 2002. (C. 82-101).

The defendant, Capital Alliance Insurance Company, Inc., did issue a series of insurance policies to Industrial Technologies. Capital Alliance has never had a policy with Richard Hill. The last insurance policy that Capital Alliance issued to Industrial Technologies, Inc. expired by its own terms at 12:01 a.m. on January 28, 1997, and was not renewed. (C. 207). Capital Assurance and Skandia have never had an insurance policy issued to the petitioner.

Mr. Hill and Industrial Technologies executed two documents titled, "Assignment of Insurance Proceeds/Rights in and to Proceeds" and "Amendment to Assignment of Insurance Proceeds/Rights in and to Proceeds Agreement," which purport to transfer all their rights in the insurance policies to Whitney National Bank. (C. 419-423). Although the plaintiffs have pled that this was rejected by Whitney Bank, there is no written document in the record which reflects such rejection, nor a withdrawal or cancellation of the assignment by Industrial Technologies and Hill. This purported transfer of rights violates the terms of the policy and bars recovery. (C. 628). *See Jones v. Crawford*, 258 Ala. 278, 62 So. 2d 221 (1952).

In the third party complaint, Richard O. Hill and Industrial Technologies, Inc. acknowledged that they had been involved in certain litigation with Jacobs Bank since 1993, involving the ownership and eventual destruction of certain equipment, which was insured by the third party defendant, Capital Alliance. (C. 88). The insurance policy in effect in 1993 was a commercial property policy and had no coverage for litigation expenses nor a duty to defend. (C. 393-395). (*See also* Appellant's corrected brief, pp. 21-22).

The lawsuit between Jacobs Bank and Industrial Technologies (Richard Hill was dismissed) was tried the week of December 3, 2001. The Jackson County jury returned a verdict in favor of Industrial Technologies, and against Jacobs Bank for compensatory damages in the amount of $148,000.00, interest in the amount of $82,310.00 and punitive damages in the amount of $250,000. (C. 88-89 and 809-812). Circuit Judge Randall Cole set aside the award of punitive damages and the case was appealed. (C. 808-812).

After appeal, the Honorable Judge Randall Cole entered a judgment in *Jacobs Bank v. Industrial Technologies, Inc.*, et al., CV1992-203 in favor of Industrial Technologies in the amount of $480,310.00 plus accrued interest on November 19, 2003. (C. 424-25). A satisfaction of judgment was filed with the Jackson County Circuit Clerk's office on January 6, 2004. The defendants requested that the Alabama Supreme Court take judicial notice of that satisfaction of judgment.